No. 2867.

IN THE

United States

Circuit Court of Appeals,

NINTH CIRCUIT.

William O'Brien,
Plaintiff in Error,
vs.
Las Vegas & Tonopah Railroad Company, (a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

C. O. WHITTEMORE,
Counsel for Defendant in Error.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No. 2867.

IN THE

United States

Circuit Court of Appeals,

NINTH CIRCUIT.

William O'Brien,
Plaintiff in Error,
vs.
Las Vegas & Tonopah Railroad Company, (a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

I.

The statement of the case in the brief for plaintiff in error is not controverted except that part in which it is stated "there was no evidence that the defendant was not guilty of any negligence." It is admitted that under the Nevada State Insurance Law, or Workmen's Compensation Act, the burden of proof is on the defendant in error to rebut the presumption of negligence. We contend that this requirement of the law

was fully complied with. The record, not having been printed, is not before us, but references will be made to the testimony of witnesses and other evidence in supplemental brief to be filed after we have had an opportunity to examine the record.

II.

Counsel for plaintiff in error devotes much space in his brief in an effort to show that the evidence was insufficient to support the verdict, which is not an assigned error.

III.

We will discuss the alleged errors in the order assigned.

First. The first error assigned is that the court erred in admitting in evidence on the cross-examination of the plaintiff the paper marked "Defendant's Exhibit No. 1." This paper is set forth in full in the brief of plaintiff in error, commencing on page 15. That part of the record containing the questions and answers and the ruling of the court leading up to the introduction of this exhibit commences on page 12 of brief of plaintiff in error. It will be noted that there is nothing in this statement, signed by plaintiff shortly after the injury, that is not testified to by him as a witness in this case upon direct examination, except possibly his answer to interrogatory 4 on page 16 of the brief of plaintiff in error, "Could you by more care on your part have prevented your injury?" "Answer: Yes." The plaintiff admits the correctness of the statement in regard to this question and answer as shown by

question on bottom of page 16 of brief for plaintiff in error, and answer of plaintiff on top of page 17 of said brief. There was nothing to the prejudice of the plaintiff in the admission of this statement, and no error of the court in admitting same.

Second. The second error assigned is that the court erred in admitting in evidence on the cross-examination of the plaintiff the paper marked "Defendant's Exhibit No. 2." This paper is set forth in full in brief for plaintiff in error, commencing on page 20, and that part of the record relating to the admission of the paper begins on page 17 of said brief.

There is nothing in this statement that was not testified to by plaintiff as a witness in this case, except possibly his answer to question 24, found on page 23 of brief for plaintiff in error, "Was anyone at fault? Of so, who? No." Plaintiff, when this paper was called to his attention, did not deny the correctness of this question and answer, nor the correctness of any of the contents of the paper, except possibly the use of the word "slipping," so that there was no error of the court in allowing this paper to be admitted in evidence as part of the cross-examination of plaintiff.

Third. The third error assigned is that the court erred in sustaining the objection of the defendant in error to the question propounded to the witness Holland, as follows:

"Q. Mr. Holland, you may state the condition of this particular gasoline motor section car at the time you received it."

The proceedings relating to sustaining objection of defendant in error to this question taken from the transcript, begins on page 30 of brief for plaintiff in error. It will be noted that an effort was made to show by the witness Holland the condition of this particular gasoline car about ten days after this accident, and without any showing as to what may have happened to the car meanwhile. The court very rightly sustained the objection to this question after counsel for plaintiff had admitted that they could not show that the car was in the same condition ten days after the accident as it was at the time of the accident. As very aptly said by the court on page 31 of brief for plaintiff in error: "A great many things can happen to a stopcock in ten days, and it don't seem to me that the company should be held responsible for that unless it was shown it was in that condition at the time of the accident," and also as remarked by the court, page 32 of brief for plaintiff in error: "It might be easy to show ten or fifteen days after the accident that the condition of that stopcock was bad. and it may have been in perfectly good condition at the time of the accident." There was no error of the court in sustaining the objection to this question.

Fourth. The fourth error assigned is that the court erred in sustaining the objection of the defendant in error to the question propounded to the witness M. N. Holland, as follows:

"Did you have any trouble with that car immediately after it was turned over to you?"

The proceedings in the examination of the witness Holland leading up to this question and to the sustaining of the objection made by counsel for defendant in error are set forth in the assignment of errors, and also on page 33 of brief for plaintiff in error. This record shows that the car was not turned over to the witness Holland until eight or ten days after the accident; consequently the condition of the car at that time would not be material or relevant, and there was no error in the court's sustaining the objection to this question.

Fifth. The fifth error assigned is that the court erred in sustaining the defendant's objection to the question propounded to the witness M. N. Holland in rebuttal:

"At the time that Mr. Claiborn gave you this particular car on which Mr. O'Brien was hurt after Mr. O'Brien's accident, was or was not the petcock wired?"

The proceedings regarding this question and the ruling of the court in sustaining the objection are found commencing on page 35 of brief for plaintiff in error. It will be noted that the objection to this question is based upon the fact that the witness Holland had testified in direct examination that he did not receive the car from Mr. Claiborn until eight days after the accident, and there was no effort to show and no showing that the car was in the same condition at the time the car was delivered to the witness Holland as it was at the time of the accident. There was no error in the court sustaining the objection to this question.

Sixth. The sixth error assigned is that the court erred in sustaining the defendant's objection to the question propounded to the witness M. N. Holland in rebuttal, as follows:

"Q. Mr. Holland, at the time Mr. Claiborn delivered the car on which Mr. O'Brien was hurt to you did you see any evidences of fire on it?"

The same objection was urged to this question as had been urged to the previous questions that there was no showing or attempt at a showing that the car was in the same condition when it was received by Mr. Holland eight days after the accident, as it was at the time the accident occurred, and there was no error in the court sustaining the objection to this question.

Seventh. The seventh error assigned is that the court erred in refusing to give plaintiff's requested instruction No. 8, as follows:

At the close of the evidence, plaintiff requested the court to give to the jury the following instruction, which was later refused, and exception taken.

"No. 8.

You are instructed that in this case, the defendant having rejected the terms of what is known as the Workmen's Compensation Act of the state of Nevada, there is no defense to plaintiff's action on the ground:

1. That the employee assumed the risks incidental or inherent to, or arising out of his employment, or

2. That the injury was caused by the negligence of a co-employee of plaintiff, or

3. That the plaintiff was negligent, and

4. In this case you are to presume that the injury to plaintiff was the first result and grew out of the negligence of the employer; and that such negligence was the proximate cause of plaintiff's injury provided you find from the evidence that the defendant was negligent."

We contend that this instruction was given in substance and almost in its entirety in the court's instruction to the jury, as follows:

At the conclusion of the argument, the court instructed the jury as follows:

"The Court: This has been a very interesting trial, not only in itself, but interesting because it is one of the first cases tried under what is known as the 'Workmen's Compensation Act' passed by our legislature in the year 1913, and amended during the present year.

Under the law as it existed before the passage of this statute, this railroad company could come before you, and allege, and attempt to prove, that the defect alleged was one of the ordinary risks of the business that plaintiff assumed when he entered into the service. The statute has taken that defense away. The corporation might also come here and state that the carelessness was the carelessness of a fellow servant. That defense the legislature has also taken away. It might also defend itself on the ground that the plaintiff himself was partly to blame for the occurrence. That, also, is taken away.

I want to read to you the statute. I shall read it slowly, because I wish you to observe it very carefully.

'In actions by an employee against an employer for

personal injuries sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the first result, and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of proof shall rest upon the emplover to rebut the presumption of negligence.'

This presumption does not control you, except in the absence of testimony. If there were no testimony on that point, you would presume that the negligence of the company was the direct and proximate cause of the injury. But when testimony has been produced, you are to consider all the testimony; and after a comparison and consideration of all, you are to arrive at your verdict, remembering that the mere fact that a man is injured, however much his injury may appeal to our sympathies, is not a sufficient reason why you or I, or any one else, should be compelled to pay for it. We can only be held responsible for an injury to another person, where we have by our negligence caused the injury.

Negligence under the law is the failure to perform a duty which is owed to another; that is, the failure to do that which an ordinary man, an ordinary prudent man, engaged in the same business, under the same circumstances, would do.

In this case the charge is laid in the complaint, and you are to remember that the plaintiff is bound by his complaint; he can only recover for the injury there alleged—he can only recover for the negligence there

alleged. The defendant may have been guilty of other negligence which resulted in his injury, but you cannot find a verdict on that score. For instance, if it should appear in this case that the injury was due to a broken wheel, or to a defective rail, or because the rails had not been properly spiked, you could not bring in a verdict for the plaintiff, no matter how negligent or careless the defendant may have been; you can only bring in a verdict for the negligence which is alleged in the complaint itself.

The allegation is that the defendant, riding on a handcar, was thrown off, and it was due to a specific failure on the part of the defendant to perform a duty.

The complaint says:

'Said gasoline motor section car was defective in that the gasoline drain and tank valve, sometimes called the gasoline feed pipe, draincock or petcock, was so worn and out of repair that it caused and permitted the gasoline from the gasoline tank of said car to escape and fall upon the heated parts or portions of the machinery of the motor of said car, which said defect was known to defendant, its officers, agents and employees or could have been known to defendant, its officers, agents and employees by proper inspection, whereby the said gasoline became ignited and flamed up.'

The only defect alleged here is that the stopcock was so worn and out of repair that it caused and permitted the gasoline from the gasoline tank to escape. You cannot find defendant was negligent because someone had opened the stopcock, or because it had been carelessly left open. The escape of the gasoline must have

been due to the fact that the cock itself was worn, and out of repair.

Now the statute throws the burden of proving that it was not guilty of negligence in this respect upon the defendant itself. You, however, are not required to find the absence of negligence in the defendant's own testimony. You are to consider all the testimony together, and if it shows that defendant was not negligent, then you cannot in respect of the defective stopcock bring in a verdict for the plaintiff."

If taken as a whole the charge was substantially correct and could not have misled the jury, the judgment will not be disturbed. (Hayne on New Trial and Appeal, Sec. 131, and cases cited.)

A case will not be reversed on some technical error in giving instructions when it is apparent from the entire record that the jury could not have been misled. (Pierce v. Seattle Electric Co., 145 Pac. 228-231.)

An instruction as follows was held to correctly state the law: "Preponderance and weight of testimony is where you believe the truth to be after hearing all the evidence." (Johnson v. Delano, 154 Northwestern 1013.)

There was no error in the refusal of the court to give instruction No. 8 in the form as requested by plaintiff in error.

Eighth. The eighth error assigned is that the court erred in giving the instruction upon the request of the jury at the time of their return into court, 10:50 o'clock p. m., for further instructions, which instruction and

the proceedings thereon are set forth in full in the assignments of error, and are as follows:

(At 10:50 o'clock p. m. the jury returned into court with a request for further instructions.)

"The Court: Gentlemen, can I be of service to you?

A Juror: May it please Your Honor, we would like to have that portion of the statute read touching on the Compensation Act. There is some dissension as to certain phases of the case, but I presume it would not be the proper thing to state to Your Honor just what that is.

The Court: Is it a question of fact or a question of law?

Juror: It is a question of fact. One of the jurymen, particularly, would like to hear the Workmen's Compensation Act read again, and then we will endeavor to thrash it out—do the best we can.

The Court: When you asked for the statute, and I told you you might have a copy of the portion that was read, I spoke before I thought. I had the copy made, but when I read it over, it seemed to me that without explanation, it was hardly the proper thing to send you. The statute reads as follows:

'In actions by an employee against an employer for personal injuries sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the first result, and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of

proof shall rest upon the employer to rebut the presumption of negligence.'

Prior to the enactment of the Workmen's Compensation Act the burden was on the plaintiff to establish his case by a preponderance of the evidence; in other words, it was necessary that the evidence should show that the defendant was guilty of negligence which directly caused the injury. Now this has been reversed. If it appears that O'Brien was injured in the course of his employment, it is presumed that the injury was the first result of, and grew out of the negligence of the railway company, and that such negligence was the direct cause of the injury. This is not a conclusive presumption; it merely constitutes a *prima facie* case, and it is sufficient to throw the burden of proof on the defendant to rebut the presumption of negligence.

Having heard and considered all the evidence, if you find therefrom that the defendant was not guilty of negligence, it is your duty to bring in a verdict in the defendant's favor, but you must find that it was not guilty of negligence, otherwise your verdict would be for the plaintiff.

Is that what you want, gentlemen?

Juror: That was it, Your Honor.

The Court: But you are expected to consider all the testimony on that point.

Juror: That was the very question that I wished to mention again. I understood it, and you explained that very clearly and emphatically, that all the evidence must be taken into consideration in connection with the responsibility placed upon the defendant in this case by

its not complying with the provisions of the Workmen's Compensation Act.

The Court: You are, of course, to consider all the testimony, and to arrive at your conclusions from a consideration of the testimony."

We submit that there was no error in these instructions. The instructions of the court were very full, and particularly as to the burden upon the defendant in error to prove that it was not guilty of negligence, and in our opinion nothing could have been stronger than the language of the court in the latter part of this instruction, as follows:

"But you must find that it (defendant in error) was not guilty of negligence, otherwise your verdict would be for the plaintiff."

There was no error in the last part of the court's instructions that the jury were to consider all the testimony and arrive at their conclusions from a consideration of the testimony. Counsel for plaintiff in error contends that only the evidence offered by defendant should have been considered by the jury in rebutting the presumption of defendant's negligence. The burden was on the plaintiff to show that the accident was caused in the manner alleged in the complaint, i. e., by the gasoline leaking from the stopcock taking fire, and if this had been established by plaintiff's testimony, the burden then would shift to the defendant in error to show that the leaking stopcock was not due to the negligence of defendant.

One of the contentions of defendant in error before the jury was that the plaintiff had utterly failed to

show that the gasoline was leaking from the stopcock, and that it had caught fire. It was contended by defendant in error that the story as told by the plaintiff upon the witness stand was improbable, and not worthy of belief by the jury. Expert witnesses were placed on the stand by defendant in error and gave testimony that it would have been impossible for gasoline leaking from the stopcock to have taken fire without an instantaneous explosion of the gasoline in the tank, and the blowing up of the car. The testimony of the plaintiff that he had time to look first on one side of the car, and then on the other side, and to shut off the brakes while a stream of gasoline was pouring from the stopcock, and was burning, was branded by expert witnesses of defendant as an improbable story, and an impossible condition.

The verdict of the jury shows that after consideration of all the evidence, they did not believe this improbable and impossible story of the plaintiff told on the witness stand. In determining the fact that there was no defective stopcock, and consequently no negligence of the defendant in error, the jury were entitled to consider all of the testimony offered by the defendant as to these points, as well as the testimony of the plaintiff, and as instructed by the court.

The contention of counsel for plaintiff that in determining this question of lack of negligence on the part of defendant that the jury was only to consider the testimony offered by defendant is not tenable and is not the law. If the evidence brought out on cross-examination of plaintiff shows or tends to show that defendant was not negligent, this

testimony is entitled to be considered by the jury in determining this fact, and to overcome the presumption of defendant's negligence raised by the statute. The record will disclose that there was evidence offered by defendant in error tending to show that the gasoline car was in good order when taken out by plaintiff and his co-workers, and that the morning following the accident the car was in good condition and running order, and that there were no marks or indications on the car of it having caught fire, and there was also evidence that the stopcock was in good condition, and was not leaking. This was immediately following the accident and before the car had been used except to run back from the point of the accident to the station at Bonnie Clare. It was shown by defendant by testimony at the trial that the car was taken out the next morning after the accident and used without anything being done to the car, and that there were no evidences of the car having been on fire, nor sign of any defect of the stopcock. All of this was affirmative evidence on the part of defendant, tending to overcome the presumption of defendant's negligence.

That all the rights of plaintiff in error under the Nevada Workmen's Compensation Law were fully protected by the court in its instructions to the jury is further shown by the court's instruction to the jury, as follows:

"The burden of proof in this case is on the defendant to establish by a preponderance of the evidence that it was not negligent in causing the accident or the injury. In this connection, however, remember that it devolves upon the plaintiff to establish by competent

testimony, and by a preponderance of the evidence, the kind and character of negligence as charged in the complaint in this action; in other words, the proof in this regard must coincide with the allegations of the complaint, which in this case charges the defendant with negligence in supplying on the motor car a defective or worn out stopcock. If you find from the evidence that the stopcock was not defective or worn out, or that the defendant was guilty of some other act of negligence not charged in the complaint, you will not then be justified in finding that the defendant was negligent in this action, and it would be your duty to bring in a verdict for the defendant company."

It will be presumed in this case that the evidence was sufficient to support the verdict of the jury, and that the jury were governed by this and the other instructions of the court in rendering their verdict, and that there was affirmative evidence showing that the stopcock was not defective or worn out, and that the defendant in error was not negligent in causing the accident resulting in the injury to the plaintiff in error.

Respectfully submitted,

C. O. WHITTEMORE,

Counsel for Defendant in Error.